No. 20-16868

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL URBAN LEAGUE, et al.

Plaintiffs-Appellees,

v.

WILBUR L. ROSS, JR., et al.,

Defendants-Appellants,

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL AND FOR AN IMMEDIATE ADMINISTRATIVE STAY PENDING DISPOSITION OF THE STAY MOTION

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CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

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(2) Facts showing the existence and nature of the emergency

Federal law requires that "[t]he tabulation of total population by States … as required for the apportionment of Representatives in Congress among the several States shall be completed" and "reported by the Secretary to the President of the United States" by December 31, 2020. 13 U.S.C. § 141(b); *see id.* § 141(a). The Census Bureau has established a schedule designed to meet that deadline while achieving maximum accuracy. That schedule sets a target date of September 30 for concluding field operations so that it can begin the final phase of the census at that time. On September 24, 2020, the district court issued a preliminary injunction that "stayed" the "December 31, 2020 [statutory] deadline for reporting the tabulation of the total population to the President" and the Bureau's "September 30, 2020 deadline for the completion of data collection," and enjoined the government "from implementing these two deadlines." Add.78. Immediate relief is therefore necessary.

(3) When and how counsel notified

Counsel were notified by email this morning shortly after 10am Pacific. Plaintiffs' counsel stated that plaintiffs oppose this motion.

(4) Submissions to the district court

The government sought a stay of the preliminary injunction both in a filing on that motion before the district court, *see* Doc.196 at 11, and orally during the district court's hearing on the preliminary injunction on September 22, *see* Add.155-56. After the district court did not rule on a stay pending appeal in its preliminary injunction

order, the government today filed a renewed motion for stay pending appeal out of abundance of caution, Doc.211, which the district court denied shortly thereafter, Doc.212.

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INTRODUCTION AND SUMMARY

The Secretary of Commerce, the Department of Commerce, the Bureau of the Census, and its Director respectfully request that this Court stay the district court's preliminary injunction entered on September 24, 2020 and that it immediately issue an administrative stay to allow the government to complete the decennial census by December 31 as required by the Census Act.

Congress has required that "[t]he tabulation of total population by States … as required for the apportionment of Representatives in Congress among the several States shall be completed" and "reported by the Secretary to the President of the United States" by December 31, 2020. 13 U.S.C. § 141(b); *see id.* § 141(a). In March 2020, the Census Bureau suspended field operations because of the COVID-19 pandemic, and it initially proposed that Congress adopt an extension of that statutory deadline. But when it became clear that Congress was unlikely to extend the deadline, the Bureau developed and began implementing a schedule, known as the "Replan Schedule," that could meet the statutory deadline despite the earlier delays. The schedule sets September 30 as the target date on which the Bureau will conclude data-gathering operations in order to begin the final crucial phase of its operations in which it processes the vast array of data it has received—a process that requires analysis, corrections, and integration, culminating in the assignment of the entire population to over 11 million census "blocks" that form the basis for apportionment, redistricting, and the allocation of funds in a variety of programs.

The district court did not question the lawfulness of the deadline imposed by the Census Act, and it "agree[d] that the Census Act's statutory deadlines bind" the Bureau. Add.68. The court nevertheless enjoined the Department and the Bureau from implementing the Schedule's "September 30, 2020 deadline for the completion of data collection and the December 31, 2020 [statutory] deadline for reporting the tabulation of the total population to the President." Add.78.

This unprecedented order rests on fundamental errors of law. Most notably, the court had no authority to compel the Census Bureau to violate a statutory deadline, and it compounded its error by invoking a statutory power "to postpone the effective date of *an agency action*," 5 U.S.C. § 705 (emphasis added), as the ground for ordering the agency to violate a *congressionally* specified deadline. Add.78. By ordering the agency to violate a key provision of the Census Act, the court turned the Administrative Procedure Act on its head. Moreover, the Replan Schedule was unquestionably designed to achieve an accurate census while meeting the statutory deadline. In preventing the Bureau from following that schedule, the district court identified no standard for judging the adequacy of the Schedule or the resulting census count. Instead, it simply declared that the Bureau could do a better job if it were released from the time constraints in the Census Act, and that it was arbitrary and capricious to develop a schedule that complied with Congress's express directive.

The injunction precludes the Census Bureau from exercising its expert judgment in determining how best to achieve an accurate census within the statutory

time frame. Most immediately, it requires the Bureau to continue field operations beyond September 30, thus precluding the Bureau from acting on its October 1 target date for the final vital phase of the census, or exercising its judgment as to whether and to what extent field operations might continue without jeopardizing accuracy or the ability to achieve compliance with the Census Act. That an immediate stay is needed from this Court on an emergency basis is in no small part a byproduct of the district court's repeated refusal to issue an appealable order. The court instead enjoined operations for 19 days under temporary restraining orders for the sole purpose of pursuing massive court-initiated discovery under the guise of compiling an administrative record regarding the Bureau's non-final set of scheduling waystations en route to the December 31 statutory deadline.

STATEMENT

A. Background

1. The Constitution requires that an "actual Enumeration shall be made" of the population every ten years "in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3. In the exercise of that authority, Congress has established the timetable for census operations. The Census Act sets "the first day of April" as "the 'decennial census date,'" 13 U.S.C. § 141(a), and prescribes that "[t]he tabulation of total population by States … as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the

census date and reported by the Secretary to the President of the United States," *id.* § 141(b).

After receiving the Secretary's report, the President, under a different statutory provision, calculates "the number of Representatives to which each State would be entitled," and transmits the resulting information to Congress within a week of the new session (here, January 10, 2021). 2 U.S.C. § 2a(a). Congress has also specified that "tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State" by March 31, 2021. 13 U.S.C. § 141(c); *see Franklin v. Massachusetts*, 505 U.S. 788, 792 (1992) (describing sequence triggered by reporting of the census to the President).

2. The 2020 decennial census is an enormous and enormously complex operation. Particularly relevant here are the two final phases of the Census: the Non-Response Followup (NRFU) operation and the "post processing" operation. In NRFU the Bureau contacts non-responding addresses up to six times to secure a response. Enumerators also gather crucial information that may alter the Master Address File—the Bureau's account of every household in the country—such as changes resulting from construction, demolition, changing use, and many other factors.

In post processing, the Bureau engages in a sequence of data-processing operations designed to create reliable and usable statistics. The first step is to confirm

or correct information in the Master Address File. The final Master Address File consists of over 11 million census "blocks" that form the backbone of the census, and which are aggregated into larger units for various purposes. Because this address information is central to the census, other data-processing operations cannot take place "until the entire universe" of addresses nationwide is determined, and post-processing operations "must generally be performed consecutively." Add.97-98, ¶¶67, 68. Concluding field operations is thus an indispensable prerequisite for beginning post-processing operations.

3. The ongoing COVID-19 pandemic forced the Census Bureau to adapt quickly to new challenges, and, in mid-March, the Bureau initiated a four-week suspension of field operations to protect the health and safety of its employees and the public. Add.106, ¶78.

On April 13, the Bureau's staff finalized a schedule to adjust field operations in light of the pandemic called the "COVID Schedule." The COVID Schedule "assumed Congressional action" in the form of a 120-day extension of the statutory deadlines for providing appointment and redistricting data. Add.107, ¶80. Thus, in announcing the COVID Schedule, the Secretary of Commerce and the Director of the Census Bureau jointly "stated that they would seek statutory relief from Congress." *Id.*; *see* Doc.37-3 at 2. On the assumption that Congress would delay the completion date, the COVID Schedule would have continued the self-response

period and field operations (including the NRFU) until October 31, instead of July 31 as originally planned. Add.106, ¶79.

By late July it became clear that the Department could not rely on an amendment to the governing statute, and on July 29 the Secretary directed the Bureau's professional staff to develop a plan to meet the existing statutory deadlines. Add.107, ¶81. On August 3, Bureau staff presented a revised schedule to the Secretary, known as the "Replan Schedule," which the Secretary approved and announced that day. *Id.* The Bureau explained that it was "announcing updates to our plan … to accelerate the completion of data collection and apportionment counts by our statutory deadline of December 31, 2020, as required by law and directed by the Secretary of Commerce." Doc.37-1 at 1.

The Replan Schedule was designed to compress the remaining field operations and post processing into the five months remaining before the statutory deadline. Add.107-11, ¶¶82-89. The new schedule reduced the time for field operations by one month, concluding on September 30 instead of October 31. In doing so, the Replan Schedule takes advantage of efficiencies in the NRFU process (and the census design itself), such as software that maximizes enumerator effectiveness, as well as financial incentives to increase the number of enumerator hours worked "to get the same work hours as would have been done under the original timeframe." Add.109-10, ¶¶85-88. Thus, under the Replan Schedule, field operations are slated to conclude by

September 30, and data processing is slated to begin on October 1. Add.113, ¶100; Add.149-50, ¶¶22, 24.

B. Prior Proceedings

1. Plaintiffs, a group of local governments, Tribal nations, nonprofit organizations, and individuals, assert that the Bureau's current schedule violates the Enumeration Clause of the Constitution and that it constitutes final agency action that is arbitrary and capricious under the APA.

The district court granted a temporary restraining order on September 5, barring the Bureau from "implementing" the Replan Schedule or "allowing to be implemented any actions as a result of the shortened timelines" in that Schedule, "including but not limited to winding down or altering any Census field operations." Add.121-22.

During the period covered by the TRO, the district court engaged in quasi-adversarial discovery to create what it described as an administrative record for the Replan Schedule. The government repeatedly explained that the Replan Schedule is not "agency action" within the meaning of the APA, and that there is therefore no administrative record associated with the Replan Schedule. *See, e.g.*, Add.15-17, 45. The government urged that if the court nevertheless believed that it was reviewing final agency action and that the action could not be sustained on the basis of the declaration submitted by the government, it should "find against the Defendants on

the likelihood of success on the merits prong" and enter a preliminary injunction to enable sufficient time for orderly appellate review. Doc.88, at 3; Add.45-46.

The district court nevertheless delayed entry of an injunction and directed the expedited production of materials that would, in its view, constitute part of an administrative record. Doc.96, at 21-22. The district court ordered the government to file privilege declarations for all documents (before plaintiffs were required to challenge any specific privilege assertions) and proceeded to conduct *in camera* review through magistrate judges of all documents the government identified as privileged (notwithstanding the near-total absence of specific privilege objections by plaintiffs). Doc.153, at 1; Add.20 & n.5. In conducting this irregular process, the court concluded, among other things, that all documents postdating the Secretary's July 29 direction to prepare the Replan Schedule were post-decisional and thus not protected by the deliberative process privilege—in other words, that all deliberations regarding the formulation of the schedule at issue were post-decisional. Doc.179, at 6. On September 17, the court extended the TRO to more fully develop its conception of an administrative record, declaring that "Defendants must either produce or add to their privilege log about 1,800 documents." Add.136. In extending the TRO, the court again rejected the government's request (Doc.109, at 3) that, given the court's view of the case, it should instead enter a preliminary injunction to immediately allow for an appeal.

2. On September 24, the district court issued a preliminary injunction that "stayed pursuant to 5 U.S.C. § 705" the "September 30, 2020 deadline for the completion of data collection and December 31, 2020 deadline for reporting the tabulation of the total population to the President" and enjoined the government "from implementing these two deadlines." Add.78.

After finding that there was final agency action that was reviewable, the court found that the Bureau had acted arbitrarily and capriciously in failing to consider the possibility of violating the statutory deadline in the Census Act. The court emphasized that Bureau officials had stated (before developing or considering a revised plan, and while seeking an extension from Congress) "that the Bureau could not meet the December 31, 2020 statutory deadline," Add.59; *see* Add.63, and had more recently expressed doubt about meeting the deadline because of natural disasters and other issues, Add.61. The court declared that the agency had not adequately "explain[ed] why Defendants are 'required by law' to follow a statutory deadline that would sacrifice constitutionally and statutorily required interests in accuracy." Add.70.

ARGUMENT

This Court should stay the preliminary injunction pending appeal, and enter an immediate administrative stay while it considers this motion. In determining whether to grant a stay, this Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially

injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

The district court has required the Department of Commerce and the Census Bureau to defy the statutory mandate governing the census. The order is premised on grave legal error, and, unless stayed, will result in irreparable injury to the government and the public interest.

A. The District Court's Order Is Premised On Clear Legal Error

1. a. The Enumeration Clause of the Constitution provides that the "actual Enumeration" of the population shall be conducted "in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3. As the Supreme Court has explained, this textual assignment grants Congress "virtually unlimited discretion" to "conduct[] the decennial" census, which Congress in turn largely has delegated to the Executive Branch. *Wisconsin*, 517 U.S. at 19. One aspect that Congress did not delegate, however, is the date for completion of apportionment counts. 13 U.S.C. § 141(b). That deadline is set at December 31, 2020.

The district court did not conclude that application of the statutory deadline is unconstitutional. On the contrary, it specifically declined to reach plaintiffs' argument on that score. Add.44. Accordingly, the court declared that it "agrees that the Census Act's statutory deadlines bind Defendants." Add.68.

That should have been dispositive. Agencies "do not have the authority to ignore unambiguous deadlines set by Congress," *Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1299 (9th Cir. 1992), and the Census Act is no exception: absolutely nothing suggests that the Department or the Bureau have any authority to disregard or unilaterally extend the statutory deadlines. When the Bureau developed the COVID Schedule that prescribed field operations to continue until October 31, 2020, it was proceeding on the assumption that Congress would extend the statutory deadline by 120 days. Congress, however, did not enact an amendment to the statute. As a result, the Bureau had no practical choice but to develop a schedule that would allow it to meet the statutory deadline. That is what it did with the Replan Schedule. The district court's order "stay[ing]" the statutory deadline under 5 U.S.C. § 705 is not only nonsensical—that provision of the APA allows staying only "agency action," not a congressionally enacted statute—but is premised on the remarkable belief that a court can, under the aegis of arbitrary-and-capricious review, compel an agency to act "not in accordance with law," 5 U.S.C. § 706(2)(A).

b. The district court did not directly grapple with this fundamental problem. Instead, it purported to identify five failings in the agency's reasoning that rendered compliance with the statutory deadline arbitrary and capricious. But all of those reasons ultimately rest on the claim that the agency was insufficiently attentive to the possibility of *disregarding* Congress's plain instructions. *See, e.g.*, Add.47 (in adopting the Replan Schedule to "meet[] the Census Act's statutory deadline," the agency

"failed to consider how Defendants would fulfill their statutory and constitutional duties to accomplish an accurate count on such an abbreviated timeline"); Add.64 (agency acted arbitrarily and capriciously by "sacrific[ing] adequate accuracy for an uncertain likelihood of meeting one statutory deadline"); Add.70 (concluding that the agency's announcement of the Replan Schedule "never explains why Defendants are 'required by law' to follow a statutory deadline that would sacrifice constitutionally and statutorily required interests in accuracy").

The district court sought support for this novel holding in a misreading of disparate cases holding either that an agency does not necessarily lose authority to implement a statute when it exceeds statutory deadlines, or that attempts to compel agency action as unlawfully withheld do not succeed simply because an agency has not acted by the date prescribed by statute. Those cases are quite unlike "staying" a statutory deadline or enjoining an agency from "implementing" such a deadline. And in all events, the court in each of those cases based its holding on its interpretation of the statute at issue.

In *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003), for example, the Supreme Court analyzed the governing statute to conclude that it did not deprive the agency of authority to assign coal retirees to coal companies for purposes of funding retiree benefits under that Act. The Court noted, among other things, that "[s]tructural clues support the Commissioner in the Coal Act's other instances of combining the word 'shall' with a specific date that could not possibly be read to prohibit action outside

the statutory period." *Id.* at 161. Similarly, in *Linemaster Switch Corp. v. U.S. E.P.A.*, 938 F.2d 1299 (D.C. Cir. 1991), the D.C. Circuit concluded that the applicable statute authorized EPA to add hazard waste sites after a statutory deadline, explaining that "[o]ur own review of the legislative history surrounding [the statute] suggests that Congress would not have wanted to revoke EPA's authority to list sites." *Id.* at 133. In *Newton County Wildlife Ass'n v. U.S. Forest Service*, 113 F.3d 110, 112 (8th Cir. 1997), the Eighth Circuit held that the statutory deadline did not by its terms apply to the action, and that the agency "did not violate" the statute. And in *National Congress of Hispanic American Citizens v. Usery*, 554 F.2d 1196, 1198 (D.C. Cir. 1977), the court rejected an attempt to compel agency action as unlawfully withheld, explaining that "[t]he sole issue involved is whether Congress meant for the timetable in [the statute] to be mandatory." In contrast to the decisions cited by the district court, the deadline here concerns not regulatory programs but the report to the President, who then in turn provides a report to Congress itself. *See* 2 U.S.C. 2a(a). That Congress might choose to retroactively extend census deadlines, as it did in the early 1800s, Add.67, only underscores the absence of the Executive's authority to disregard those deadlines while they remain in place.

The district court's reliance on *Regents of the University of California v. Department of Homeland Security*, 140 S. Ct. 1891, 1911 (2020), for the proposition that "Defendants 'did not appear to appreciate the full scope of [their] discretion,'" Add.68, was misplaced. *Regents* concerned the wind down of an enforcement policy adopted by the

agency *as a matter of discretion*. The Supreme Court did not suggest that agencies have similar discretion to disregard express Congressional commands.

c. The district court committed a related error in repeatedly declaring that the Bureau's "statutory and constitutional duties to accomplish an accurate count" require the Bureau to proceed as if the statutory deadline is precatory or merely aspirational. Add.47; *see* Add.47-48, 66, 68. The court identified no judicially manageable or enforceable standard of census accuracy. The Supreme Court has repeatedly made clear that no census has been fully accurate. *See Department of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 322 (1999) ("[T]he Bureau has always failed to reach—and has thus failed to count—a portion of the population."); *accord Wisconsin*, 517 U.S. at 6-8; *Karcher v. Daggett*, 462 U.S. 725, 735-38 (1983). Despite this fact, the Court has never suggested that the Constitution or the Census Act provides a standard for evaluating a particular census plan. Neither source "contain[s] guidelines for an accurate decennial census" that might suffice for a "judicially administrable standard" of accuracy. *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1415, 1417 (7th Cir. 1992); *cf. Wisconsin*, 517 U.S. at 17-18 (rejecting conclusion that past Supreme Court decisions required "a census that was as accurate as possible" and explaining that "[t]he Constitution itself provides no real instruction" on what metrics to use to measure "accuracy" in the census). In contrast, the requirement to present the complete census results to the President by December 31 is explicit and unambiguous.

The court mistakenly suggested that the Census Bureau itself had determined that complying with the statutory deadline would violate a legal standard. The court recounted in detail expressions of doubt by Bureau personnel about whether the Bureau could meet the statutory deadline, as well as internal discussions expressing worries about a reduction in accuracy or data quality as a result of a compressed timeframe. On this basis, the court declared that "the Bureau concluded internally that trying to get the count done by the December 31, 2020 statutory deadline would be unacceptable to the Bureau's statutory and constitutional interests in accuracy." Add.57; *see* Add.48-61.

These concerns did not represent a Bureau conclusion that a shortened timeframe would result in a violation of constitutional or statutory standards, and the cited statements relevant to plaintiffs' claims preceded the formulation and implementation of the Replan Schedule. The Bureau emphasized that it designed the Replan Schedule to "achieve a complete and accurate census and report apportionment counts by the statutory deadline," Add.111, ¶91, by leveraging the "more efficient and accurate data collection operation" enabled by "the design of the 2020 Census," and taking advantage of programs to encourage enumerators to work "the same work hours as would have been done under the original time frame," Add.109, ¶¶86, 88. There is no indication that the Bureau believes that the Replan Schedule will result in unacceptable inaccuracies—provided that the Bureau is, in fact, allowed to operate under that Schedule, and adjust its operations to conditions on the

ground, without court-imposed delays, judicial micromanagement of the Bureau's operations, and the distractions attendant to improperly ordered discovery. *See* Add.147-48, ¶14.

2. Even apart from the fatal legal errors underlying its analysis, the court's order constitutes an extraordinary intrusion into the operation of a complex and technical agency program developed and implemented over years, involving enormous resources and personnel. A court cannot properly entertain the sort of "broad programmatic attack on an agency's operations" that is "preclude[d]" by the APA. *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 64 (2004). Plaintiffs must instead identify "circumscribed" and "discrete" agency actions that they challenge, *id.* at 62; requests for improvement or changes to an agency program must be made in "the halls of Congress, where programmatic improvements are normally made," rather than by "court decree," *id.* at 64 (quotation omitted). As the Fourth Circuit observed, challenging "design choices" in the 2020 census "inevitably would lead to court involvement in 'hands-on' management of the Census Bureau's operations," which "is precisely the result that the 'discreteness' requirement of the APA is designed to avoid." *NAACP v. Bureau of the Census*, 945 F.3d 183, 191 (4th Cir. 2019).

The Replan Schedule, like the COVID Schedule, is a collection of individual judgments by the Census Bureau, all subject to constant revision based on new data, time and resource constraints, and changes in conditions on the ground. New obstacles may pose delays, but in other cases new efficiencies in the design and

execution of the census may advance a timetable. Indeed, as of September 4, before the court's temporary restraining order, the Bureau had already completed operations in approximately 50 area census offices where counting was complete, and those closeouts enabled the Bureau to reallocate "enumerator resources from areas that are complete to areas that require more work." Add.112, ¶¶95, 96. And by the end of the day of September 24, it had enumerated 97% of all households nationwide. *See* https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-09-25.pdf.

The district court's orders in this case track the breadth of plaintiffs' claims and the programmatic nature of the relief. After issuing and extending a TRO that barred the Bureau from implementing various components of the Replan Schedule, the court assumed supervisory authority over the census, ordering the Bureau to respond to employment complaints from individual enumerators, Doc.127 at 1, 2; Doc.127-1, ¶¶12-16, 20, 21; to address complaints submitted by individual non-party enumerators about alleged software glitches that predated the temporary restraining order, Doc.127 at 1, 2; Doc.127-1, ¶¶17, 19, 21; and to provide the court with information about how the Bureau is responding to wildfires in Western states, Doc.127 at 3; Doc.127-1 ¶22. The case now illustrates how "enter[ing] general orders 'compelling compliance with broad statutory mandates' … result[s] in 'injecting the judge into day-to-day agency management' and raises the 'prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives.'" *Center for*

Biological Diversity v. Veneman, 394 F.3d 1108, 1112 (9th Cir. 2005) (quoting *Southern Utah*, 542 U.S. at 66-67).

In insisting that it was not undertaking the management of the census, the court declared that, in contrast to *NAACP*, plaintiffs here claim that the Bureau "fail[ed] to consider important aspects of the problem" or give a "reasoned explanation" for the Replan Schedule. Add.30. But such assertions are common to every APA challenge, and they provide no basis for the court's injunction here. *See NAACP*, 945 F.3d at 189 (rejecting claims presented "as a request to 'set aside agency action' under Section 706(2)"). And although the district court insisted that plaintiffs' claims did not require the court "to enforce free-floating standards of 'sufficiency,'" Add.30, that is precisely what the injunction here does: it forbids the Bureau from following the Replan Schedule on the ground that the census will not be sufficiently accurate, without ever specifying what measure of accuracy is required or what level of accuracy the court believed the Replan Schedule would be able to achieve. An order that purports to direct the timing of agency operations and enjoins the Bureau "from implementing" both the statutory deadline and the predicate internal deadlines, Add.78, cannot be regarded as review of *discrete* agency action or as an order that compels performance with a discrete specific duty. *Southern Utah*, 542 U.S. at 64.

The district court was on no firmer ground in asserting that it was undertaking a review of "circumscribed, discrete agency action" on the basis that the Replan Schedule was "treated" that way by the Bureau internally. Add.31. The district court

apparently derived this conclusion from the fact that the Bureau "named [the Schedule] the 'Replan,'" presented it to the Secretary "in a single [Powerpoint] slide deck," announced it in one press release, and that the complex of decisions and deadlines that it reflects were "a codified term for the agency action directed and adopted by the Secretary." Add.31, 32. Being able to summarize the many changes in the multifarious operations entailed in shifting the course of the census in a set of Powerpoint slides and to group those changes under a general heading cannot elide the fact that they encompass a vast number of interlocking parts formulated to complete the most accurate census possible in the timeframe established by Congress. Nor does it render those myriad changes final or discrete agency action.

B. A Stay Is Necessary to Halt an Injunction That Requires the Census Bureau to Defy a Congressional Deadline and Precludes a Census That Conforms to the Governing Statute.

An immediate administrative stay is necessary to prevent irreparable harm to the conduct of the census as mandated by statute, an interest shared by the public as well as by the Executive Branch and Congress. The Bureau cannot commence the final phase of the census until it concludes field operations, and the Replan Schedule establishes October 1 as the target date for beginning those post-processing operations. The period allotted for these crucial operations has already been significantly streamlined; the operations will require the concerted devotion of personnel and resources seven days a week throughout that time. Add.111, ¶89. To achieve an accurate census while meeting the statutory deadline, the Replan Schedule

shortened the schedule for post-processing operations from five to three months. In so doing, the Bureau has already "compressed post enumeration processes to the extent [it] believe[s] feasible," Add.150, ¶24, and it must remain free to exercise its judgment to determine the point at which field operations must give way to post processing, without facing a Damoclean threat of contempt.

The district court did not question that its order would jeopardize the Bureau's ability to properly execute the post-processing phase within the statutory time frame, and it did not feel obliged to reckon with the consequences of its order in view of its belief that it could properly enjoin the Bureau from "implementing" the statutory deadline. Add.78. That premise, as discussed, is seriously mistaken, and every day in which the Bureau is precluded from exercising its judgment frustrates its ability to most efficiently allocate its resources to achieve an accurate enumeration while meeting the statutory deadline. Add.143-50, ¶¶5-15, 19-24.

The district court nevertheless dismissed the injury resulting from its injunction as simply causing the defendants to "miss[] a statutory deadline they had expected to miss anyway." Add.75. That a court would so cavalierly characterize an injunction that would compel an agency to operate in disregard of its statutory mandate exemplifies the extent to which the order departs from all sound principles of administrative law, equitable restraint, and interbranch comity.

That immediate relief is needed from this Court on an emergency basis is likewise an unfortunate result of the district court's refusal to accept the government's

express statements that the court should enter a preliminary injunction on the basis of the record before it, rather than needlessly pursuing post-hoc development of the court's view of an "administrative record." Given the delays caused by that detour, swift relief is critical to the Bureau's completion of the census within the framework established by Congress.

CONCLUSION

The Court should (1) stay the preliminary injunction pending appeal, and (2) enter an immediate administrative stay while it considers this motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,071 words according to the count of Microsoft Word.

/s/ Brad Hinshelwood
BRAD HINSHELWOOD

CERTIFICATE OF SERVICE

I hereby certify that, on September 25, 2020, I electronically filed the foregoing docketing statement with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Brad Hinshelwood
BRAD HINSHELWOOD